

REMARKS

Claims 1-21 were previously pending, but claims 14-21 have now been withdrawn. Claims 22-27 have been added, and claim 13 has been amended. Reconsideration of presently pending claims 1-13 and 22-27 is respectfully requested in light of the above amendments and the following remarks.

Formality Corrections

Claim 13 has been amended to correctly indicate dependency to claim 12.

Election/Restriction

Applicant hereby affirms the election of Claims 1-13, drawn to an apparatus, for further prosecution on the merits. Claims 14-21 have been withdrawn. Applicants respectfully traverse the requirement for the restriction but make the above election to further prosecution without waiving their rights for further consideration of the withdrawn claims.

Rejections under 35 U.S.C. §102

Claims 1-8, 11 and 12 were rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 6,190,414 to Young et al. ("the Young patent"). The PTO provides in MPEP § 2131 that "[t]o anticipate a claim, the reference must teach *every* element of the claim..." Therefore, with respect to independent claim 1, to sustain this rejection the Young reference must contain all of the elements of the claim. This rejection is respectfully traversed because Young does not teach, "an engager device connected to the set of gears and adapted to rotate the tubular body when the axle is rotated, wherein the rotation of the tubular body expands the vertebral implant assembly."

The Office action of February 7, 2006 has identified the elongated portion 108 of the Young patent as corresponding to the tubular body of claim 1 and the spur gear 136 as

corresponding to the engager device of claim 1. As disclosed in the Young patent, the spur gear 136 is certainly not adapted to rotate the elongated portion 108. Further, because the elongated portion 108 is not adapted for rotation, it does not provide the rotation for expanding the vertebral implant assembly. Rather, it is important to the function of the instrument of the Young patent that the tubular body, i.e. the elongated portion 108, not rotate when the axle is turned. The elongated portion 108 is described as having a “rectangularly shaped bore 126” for receiving and securing a rectangular “mounting clamp 124” (col. 5, lines 1-5). As shown in FIG. 13, the jack screw 140 must be “permitted to translate vertically within the mounting clamp 124” (col. 5, lines 32-35). To permit this vertical translation, the clamp 124 and the rigidly connected elongated portion 108, do not rotate. Therefore, the rejection is not supported by the Young patent and should be withdrawn. Claims 2-13 depend from and further limit claim 1 and, therefore, are also in condition for allowance.

New Claims

Independent claim 22 has been added. This claim is allowable, *inter alia*, because it recites the following elements not found in the Young patent:

an engagement device adapted to engage a tubular body portion of the vertebral implant, wherein the tubular body portion of the vertebral implant is bounded between a pair of endplates,

an axle having a proximal end and a distal end; and

a plurality of gears operatively connected between the proximal end of the axle and the engagement device,

wherein rotation of the axle causes the tubular body to rotate relative to the pair of endplates.

Claims 23-27 depend from and further limit claim 22 and, therefore, are also in condition for allowance.

Conclusion

It is clear from all of the foregoing that independent claims 1 and 22 are in condition for allowance. Dependent claims 2-13 and 23-27 depend from and further limit independent claims 1 and 22 and therefore are allowable as well.

An early formal notice of allowance of claims 1-13 and 22-27 is requested.

Respectfully submitted,



Julie M. Nickols
Registration No. 50,826

Dated: 5/1/06

HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Telephone: 972/739-8640
Facsimile: 214/200-0853
File No.: 31132.172/ PC792.00
Document No.: R-134755_1.DOC

I hereby certify that this correspondence is being deposited
with the United States Postal Service as first class mail in an
envelope addressed to: Commissioner For Patents, P.O. Box
1450, Alexandria, VA 22313-1450

on: 5-1-06
Gayle Connor
Signature of person mailing paper and fee